Supreme Court, U. S.
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No. 80-754

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MISSOURI,
*Petitioner,*
v.
WILLIAM D. COUNSELMAN, JR.,
*Respondent,*

•

STATE OF MISSOURI,
*Petitioner,*
v.
BOBBY JOE MCGEE,
*Respondent,*

•

STATE OF MISSOURI,
*Petitioner,*
v.
MARLON PAYNE,
*Respondent,*

•

STATE OF MISSOURI,
*Petitioner,*
v.
MICHAEL WHITE,
*Respondent,*

•

STATE OF MISSOURI,
*Petitioner,*
v.
JOHNNY WILLIAMS,
*Respondent,*

**PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF MISSOURI**

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## QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both first degree robbery, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975, and armed criminal action, § 559.225, RSMo Supp. 1976, where the proof required to establish a violation of the former is necessarily required to prove a violation of the latter?

2. Whether the Missouri courts are bound by *Brintley* v. *Michigan*, ____ U.S. ____, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), a decision of this Court dismissing an appeal (wherein the same federal constitutional issue was raised) for want of a substantial federal question?

3. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980), *rehearing en banc*, (August 18, 1980), wherein that court held that convicting respondent in a single proceeding of both first degree robbery and armed criminal action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision in *Brintley* v. *Michigan*, ____ U.S. ____, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979); therein this Court dismissed, for want of a substantial federal question, an appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant in a single proceeding of both armed robbery, § 750.593, M.C.L.A., and possession of a firearm during the commission of a felony, § 750.227(b), M.C.L.A.

4. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980),

*rehearing en banc,* (August 18, 1980), conflicts with this Court's decision rendered in *Whalen* v. *United States,* ____ U.S. ____, 100 S.Ct. 1432, ____ L.Ed.2d ____ (1980)?

5. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State, supra,* is in accordance with this Court's order of May 27, 1980, vacating judgment and remanding the case to the Missouri Supreme Court for further consideration in light of *Whalen* v. *United States, supra?*

## PARTIES

In the Missouri Court of Appeals, Eastern District, the parties were as follows:

State of Missouri, respondent, and Wallace D. Counselman, Jr., appellant, in cause No. 41,088;

State of Missouri, respondent v. Bobby Joe McGee, appellant, in cause No. 40,082;

State of Missouri, respondent, v. Marlon Payne, appellant, in cause No. 40,983;

State of Missouri, respondent, v. Johnny Williams, appellant, in cause No. 41,095;

State of Missouri, respondent, v. Michael L. White, appellant, in cause No. 41,276.

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MICHAEL WHITE,
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STATE OF MISSOURI,
*Petitioner,*
v.
JOHNNY WILLIAMS,
*Respondent,*

**ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT**

## PETITION FOR CERTIORARI

Petitioner, State of Missouri, respectfully requests that writs of certiorari issue to review the judgments of the Missouri Court of Appeals, Eastern District, in these cases.

## OPINIONS BELOW

The opinions in the five cases for which the writ of certiorari is being sought are printed in Appendix A. None of them have yet been published. In alphabetical order the cases are as follows:

State of Missouri v. Wallace D. Counselman, Jr., No. 41,088 in the Missouri Court of Appeals, Eastern District, opinion filed January 8, 1980;

State of Missouri v. Bobby Joe McGee, No. 40,082 in the Missouri Court of Appeals, Eastern District, opinion filed April 1, 1980;

State of Missouri v. Marlon Payne, No. 40,983 in the Missouri Court of Appeals, Eastern District, May 13, 1980;

State of Missouri v. Johnny Williams, No. 41,095 in the Missouri Court of Appeals, Eastern District, filed March 4, 1980;

State of Missouri v. Michael L. White, No, 41,276 in the Missouri Court of Appeals, Eastern District, filed April 8, 1980.

## JURISDICTIONAL STATEMENT

In *State* v. *Wallace D. Counselman, Jr.*, No. 41,088, the opinion in the Missouri Court of Appeals, Eastern District, was filed January 8, 1980. On February 15, 1980, respondent's motion for rehearing was denied and the opinion was withdrawn. On March 25, 1980, a new opinion was issued in which the judgment was affirmed in part and reversed in part. On May 19, 1980, the State of Missouri's motion for rehearing and application for transfer filed in the Missouri Court of Appeals were denied. On September 9, 1980, the State's application for transfer filed in the Supreme Court of Missouri was denied.

In *State of Missouri* v. *Bobby Joe McGee,* No. 40,082 the Missouri Court of Appeals, Eastern District, issued its opinion April 1, 1980. The State of Missouri's motion for rehearing and application for transfer filed in that court were denied on June 20, 1980. The state's application for transfer filed in the Supreme Court of Missouri was denied September 9, 1980.

In *State of Missouri* v. *Marlon Payne,* No. 40,983, the Missouri Court of Appeals, Eastern District, filed its opinion May 13, 1980. The State of Missouri's motion for rehearing and application for transfer were denied September 15, 1980. The state's application for transfer filed in the Supreme Court of Missouri was denied October 15, 1980.

In *State of Missouri* v. *Michael White,* No. 41,276, the Court of Appeals issued its opinion April 8, 1980. The State of Missouri's motion for rehearing and application for transfer filed in that court were denied May 19, 1980. The State's application for transfer filed in the Supreme Court of Missouri was granted and the cause ordered transfered to the Supreme Court June 10, 1980. The cause was given Supreme Court No. 62243. The cause was submitted to the Supreme Court for decision September 23, 1980, after which the Supreme Court of Missouri transferred the cause back to the Court of Appeals on October 1, 1980. The Court of Appeals issued its mandate in conformance with its previously issued opinion October 10, 1980.

In *State of Missouri* v. *Johnny Williams,* No. 41,095, the Missouri Court of Appeals, Eastern District, issued its opinion March 4, 1980. The State of Missouri's motion for rehearing and application for transfer were denied on April 18, 1980. The State's application for transfer filed in the Supreme Court of Missouri was granted June 10, 1980 and the cause was given No. 62,085 in the Supreme Court. The Supreme Court ordered the cause

transferred back to the Missouri Court of Appeals on September 23, 1980. On September 29, 1980, the Court of Appeals issued its mandate in accordance with its previously issued opinion.

The persent petition is filed within sixty days after the entry of final judgment in all of these cases, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sections 559.180, 559.190 and 560.120, RSMo 1969, and § 559.225, RSMo Supp. 1976, are set forth in Appendix B. Section 750.227(b) and 750.529, M.C.L.A. are set forth in Appendix C.

## STATEMENT OF THE CASE

This joint petition is brought as a result of the continuing controversy over the application of federal constitutional double jeopardy principles to the prosecution of criminal defendants in Missouri under the Armed Criminal Action Statute, § 559.225, RSMo Supp. 1976, and in the

same trial, for the felony underlying the armed criminal action charge. In each of the five cases joined in this petition, the Court of Appeals has issued an opinion relying on the authority *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980); *vacated and remanded,* 445 U.S. ____ (1980); *decided upon rehearing* ____ S.W.2d ____ (Mo. banc August 18, 1980); petition for writ of certiorari pending in this court under No. 80-571. This joint petition is being filed so that, if the State of Missouri prevails in the case of *Sours* v. *State of Missouri,* it will be able to obtain the vacation of the reversals of the armed criminal action convictions in the cases which are the subject of this joint petition.

The facts in each of the cases, for purposes of the double jeopardy clause issue, are substantially the same in that each of the respondents were prosecuted under the armed criminal action statute, § 559.225, RSMo Supp. 1976, and also prosecuted for the underlying felony. In the cases of respondents Counselman, Payne and White, the underlying felony was robbery, first degree, § 560.120, RSMo 1969. In the case of respondent McGee, the underlying felony was assault with intent to do great bodily harm without malice, § 559.190, RSMo 1969. In the case of *State* v. *Johnny Williams,* the underlying felony was assault with intent to rape with malice aforethought under § 559.180, RSMo 1969. He was also convicted under the same proceedings of carrying a concealed weapon but that conviction was not the underlying felony in the armed criminal action charge and was not attacked as having violated his protection against double jeopardy.

The issues in this joint petition will be identical to those in the petition in *State of Missouri* v. *William Scott Sours,* No. 80-571, presently pending in this court.

## THE REASONS FOR GRANTING THE WRIT

Petitioner submits that writs of certiorari should issue in each of the cases contained in this joint petition because they are all based entirely on the authority of the Missouri Supreme Court's holding in *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980), *rehearing en banc* (August 18, 1980), which conflicts with recent decisions of this court.[1]

On May 27, 1980, this Court vacated the Missouri Supreme Court's judgment in *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980) (hereinafter referred to as *Sours* I), and remanded the case back for further consideration in light of *Whalen* v. *United States,* ____ U.S. ____, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The Missouri Supreme Court responded to this Court's directive by rendering an opinion in *Sours* v. *State,* No. 61458 (August 18, 1980) (hereinafter referred to as *Sours* II), wherein the Missouri Supreme Court, after determining unequivocally that the Missouri legislature clearly intended that punishment be imposed for both armed criminal action and its underlying felony, incorporated by reference its analysis on the Fifth Amendment issue made in *Sours* I. See *Sours* II, *slip opinion* at 18.

Although the Missouri Supreme Court was presented with the argument that the combined wisdom of both *Whalen* v. *United States, supra,* and *Brintley* v. *Michigan, supra,* expressed this Court's definitive determination that a defendant can be convicted in one proceeding of two crimes even where the proof required to establish a violation of the first is necessarily required to prove the second,

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[1]The Missouri Supreme Court's most recent holding in the *Sours* case is identical to original holding made prior to this Court's granting of the State's petition for a Writ of certiorari.

if the legislature so intends, it nevertheless opined as follows:

> The United States Supreme Court has never decided whether imposing separate punishments in a single proceeding both for the offense of committing a felony by means of a dangerous and deadly weapon and for the commission of the felony violates the double jeopardy clause of the federal constitution. The Court expressly declined to rule on this issue in *Simpson* v. *United States,* [citation omitted] C.F. *Whalen* v. *United States* [citation omitted]. Each time a double jeopardy question has been before the United States Supreme Court, it has found it unnecessary to address the contitutional question, because it has been able to find that the legislature did not intend to separately punish the two offenses involved. *Whalen* v. *United States,* [citation omitted]; *Simpson* v. *United States,* [citation omitted], *Iannelli* v. *United States* [citation omitted]. See *Jeffers* v. *United States* [citation omitted]. No United States Supreme Court opinion has considered a statute that contained wording similar to, or identical to, that found in Missouri's Armed Criminal Statute.

*Sours* II, *slip opinion* at 2.

In discussing *Whalen* v. *United States, supra,* the Missour Supreme Court stated:

> The Court expressly reserved the question whether, had Congress clearly imposed multiple punishments for the same offense, the imposition would violate the double jeopardy clause. Before holding that the Court would decide the question of statutory interpretation without deferring to the interpretation of the District of Columbia Court of Appeals, the Court carefully distinguished the question of statutory interpretation from the constitutional question. . . . Accordingly, since

> the Court did not reject the petitioner's statutory claim, it did not reach the constitutional issue presented. [footnote omitted]

*Sours* II, *slip opinion* at 3.

Before reasserting its position take in *Sours* I, the Missouri Supreme Court determined that, without question, the Missouri General Assembly intended that punishment be imposed for both armed criminal action and its underlying felony. That court went on to say that neither case law nor legislative enactment conflicted with the Missouri General Assembly's unequivocal intent, which appears on the face of the statute (See Appendix B), that punishment be imposed for both crimes. *Sours* II, *slip opinion* at 8-18. The Missouri Supreme Court concluded its legislative intent analysis with the specter of this Court quite apparent: "The unique wording of armed criminal action statute dictates that we must bite the bullet and meet the federal constitutional issue." *Sours* II, *slip opinion* 17-18 [footnote omitted].

With the "bullet" firmly between their teeth, the Missouri Supreme Court proceeded to readopt their original opinion rendered in *Sours* I, but not without, again, the specter of the United States Supreme Court reappearing:

> If the vacation of our prior judgment and the remand of the case for reconsideration in light of *Whalen* was intended to lead this Court [sic] to adopt the view that the General Assembly is free to impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test, we are unable to so read *Whalen* and we are not prepared to take that step. We believe that the United States Supreme Court has heretofore reserved that question as noted above. We believe that such a ruling

> would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of 'same offense' under the double jeopardy clause. It would grant to the state legislature the power to define meaning of 'same offense' as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court [sic] to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it.

*Sours* II, *slip opinion* at 22-23.

Petitioner requests that this Court reassert its definitive decisions on this federal constitutional issue for the benefit of the Missouri Supreme Court. It is clear that the Missouri Supreme Court has chosen to disregard recent decisions of this Court which have attempted to elucidate the law of double jeopardy herein raised. In *Brintley* v. *Michigan, supra,* the appellant sought to present the following question to this Court:

> Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, § 750.227(b), proscribing possession of firearm during commission of felony and for underlying felony (armed robbery in one case and second degree murder in another), where all proofs required to establish violation of underlying felony are necessarily required for proof of violation of § 750.227(b) where there is no evidence that weapon has been possessed for any other purpose than commission of underlying felony, where underlying felony is specifically charged as felony

> element of firearms possession charge, and where (in armed robber case) state has already augmented punishment for armed robberies above punishment imposed for unarmed robberies.

26 Crim.L.Rep. 4113. (§ 750.227(b), M.C.L.A. appears in Appendix D).

Petitioner submits that this Court's summary dismissal in *Brintley* v. *Michigan, supra,* was a disposition on the merits which conflicts with the Missouri Supreme Court's decisions rendered in *Sours* I and *Sours* II. Such a disposition rejects the specific challenges presented in the statement of jurisdiction and leaves, undisturbed, the original judgment appealed from. *Mandel* v. *Bradley,* 432 U.S. 173, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); *Hicks* v. *Miranda,* 422 U.S. 332, 343-345, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975).

While summary actions by this Court should not be understood as breaking new ground, they should prevent lower courts from coming to contrary conclusions on identical issues. *Mandel* v. *Bradley, supra.* It is clear that the Missouri Supreme Court in *Sours* II has come to a conclusion contrary to that reached by this Court in *Brintley* v. *Michigan, supra.* The Michigan statute, which appears in Appendix C, is remarkably similar to the Missouri armed criminal action statute. The issue summarily dismissed, for want of a substantial federal question in *Brintley,* is precisely the same issue the Missouri Supreme Court found to be dispositive in its reversal of respondent's conviction for armed criminal action in *Sours* I and II.

This Court has manifested its disapproval of state court expansion of federal constitutional rights as evidenced by this Court's opinion rendered in *Oregon* v. *Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), where it was stated:

> A state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. [citation omitted]. But, of course, a state may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.

*Id.*, 420 U.S. at 719. See also *North Carolina* v. *Butler*, 441 U.S. 369, 99 S.Ct. 1755, 1759, 60 L.Ed.2d 286 (1979).

Petitioner submits that the Missouri Supreme Court misinterpreted this Court's decision rendered in *Whalen* v. *United States, supra.* The Missouri Supreme Court quite clearly disregarded the Court's conclusion, reached in *Whalen*, that:

> In the present case, therefore, if Congress has not authorized cumulative punishment for rape and for an unintentional killing committed in the course of the rape, contrary to what the Court of Appeals believed, the petitioner has been impermissibly sentenced. The *dispositive* question, therefore, is whether Congress did so provide.

*Whalen* v. *United States*, 100 S.Ct. at 1436. (Emphasis added). It appears that the Missouri Supreme Court misinterpreted the following words of this Court:

> The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to proscribe the punishments to be imposed upon those found guilty of them, resides *wholly* with the Congress. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeop-

> ardy but also the Constitutional principle of separation of powers in a manner which trenches particularly harshly on individual liberty.

*Whalen* v. *United States,* 100 S.Ct. 1436-1437 [Citations and footnote omitted.] [Emphasis added.]

Further evidence of the Missouri Supreme Court's failure to grasp the import of the *Whalen* decision is its inability to recognize dispositive language in the *Whalen* decision. In discussing *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (which this Court found to be incorporated in the District of Columbia Code), the majority in *Whalen* state that:

> We think that the only correct way to read § 23-112, in light of its history and its evident purpose, is to read it as embodying the *Blockburger* rule of construing the penal provisions of the District of Columbia Code. Accordingly, where two statutory offenses are not the same under the *Blockburger* test, the sentences imposed 'shall, unless the court expressly provides otherwise, run consecutively.' [footnote omitted] And where the offenses are the same under that test, the cumulative sentences are not permitted, *unless elsewhere specifically authorized* by Congress.

*Whalen* v. *United States,* 100 S.Ct. at ____. [Emphasis added.] That the Missouri Supreme Court misapplied the *Blockburger* rule is further evidenced by this Court's recent opinion in *Illinois* v. *Vitale,* 27 Crim.L.Rep. 3190, wherein the test is characterized as follows:

> In *Brown* v. *Ohio,* 432 U.S. 161 (1977), we stated the principal test for determining whether two offenses are the same for purposes of barring *successive* prosecutions. Quoting from *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932), which in turn relied

on *Gavieres* v. *United States,* 220 U.S. 338, 342-343 (1911), we held that

> 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'

*Illinois* v. *Vitale, supra.*

Petitioner submits that a definitive decision by this Court, on this federal constitutional issue is necessary in this case. Diametrically opposed views exist regarding this issue in different jurisdictions, both state and federal. There appears to be conflicting views on this issue between the Missouri Supreme Court and the Eighth Circuit Court of Appeals.

The following cases from other jurisdictions have found that armed robbery and the use of a firearm in the commission of a felony are distinct offenses under the tests set forth in *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), because it was held that the charge of robbery contains elements not necessarily included in the felony firearms offense. *State* v. *Saxon,* 193 Neb. 278, 226 N.W.2d 765 (1975); *Kowalski* v. *Parratt,* 533 F.2d 1071 (8th Cir. 1976), *cert. denied,* 429 U.S. 844 (1976); *Wayne County Prosecutor* v. *Recorder's Court Judge,* 406 Mich. 374, 280 N.W.2d 793 (1979) (decision of the Michigan Supreme Court giving rise to this Court's decision in *Brintley* v. *Michigan*); *Jones* v. *Commonwealth of Virginia,* 235 S.E.2d 313 (1977); *United States* v. *Hearst,* 412 F.Supp. 877 (N.D.Calif. 1976).

The Missouri Supreme Court recognized but neglected the foregoing authority and chose to follow cases from other jurisdictions which it felt supported its view that

the double jeopardy clause prohibits punishing a person twice for the same offense in a single prosecution. *State* v. *Pinder,* 375 So.2d 836, 838 (Fla. 1979); *Tyson* v. *State,* 386 N.E.2d 1185, 1193 (Ind. 1979); *State* v. *Frye,* 283 Md. 709, 393 A.2d 1372, 1375 (1978); *Briggs* v. *State,* 573 S.W.2d 157, 159 (Tenn. 1978).

The dire need for a decision of this Court in regard to this federal constitutional issue is exemplified by recent decisions of certain state supreme courts which conflict in their interpretation of the federal double jeopardy clause. In *Whack* v. *State,* 416 A.2d 265 (Md. 1980), the Court of Appeals of Maryland (highest state court) held that imposition of punishment for both robbery with a dangerous or deadly weapon and the separate crime of use of a handgun in the commission of a felony does not violate the Fifth Amendment prohibition against double jeopardy. Conversely, the Supreme Court of Delaware, in *Hunter* v. *Delaware,* No. 215 (March 15, 1980), held that the double jeopardy clause prevented imposing punishment for both assault in the first degree and the separate crime of possession of a deadly weapon during the commission of a felony.

An immediate decision on this federal constitutional issue is necessary; even the Missouri Supreme Court so stated in *Sours* II: "Following the original *Sours* opinion our prosecutors and penal authorities indicated informally to this Court [sic] that they believed that as many as four-hundred to six-hundred prior convictions might be affected by the opinion." *Sours* II, *slip opinion* at 12.

Every jurisdiction in this country is anxiously awaiting a definitive decision by this Court in this case because the facts and federal constitutional issue here present an excellent opportunity for this Court's review; this is especially true since the legislative intent issue has been determined and no further state grounds remain in the case.

Finally, a decision is necessary because there exist decisions of this Court conflicting with the Missouri Supreme Court's decision in *Sours* II. Therefore, it is respectfully requested that this Court issue the writs and resolve the bewilderment regarding double jeopardy not only in the State of Missouri, but in every jurisdiction within this country.

## CONCLUSION

For the foregoing reasons, the Petition for Writs of Certiorari should be granted.

Respectfully submitted,

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*Attorneys for Petitioner*

**APPENDIX A**

**IN THE**

# MISSOURI COURT OF APPEALS
# EASTERN DISTRICT

DIVISION THREE

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| STATE OF MISSOURI,<br>*Respondent,*<br><br>v.<br><br>WALLACE D. COUNSELMAN, JR.,<br>*Appellant.* | **No. 41,088** |

Appeal from the Circuit Court St. Louis County

Hon. Arthur Litz, Judge

OPINION FILED:

March 25, 1980

In this jury-waived case the trial court found defendant Wallace Counselman guilty of first degree robbery and armed criminal action and sentenced him to imprisonment for concurrent eight and three year terms.

Defendant first challenges the evidentiary sufficiency to show the statutory element of putting the victim in fear.[1]

We summarize the evidence. Defendant entered a restaurant, announced to the manager Wesley Bradley that

[1]Sections 569.010 and .020, L. 1977, which became effective after this offense, omit the express element of "putting in fear"; now it suffices to show that in overcoming the victim's resistance defendant was armed with a deadly weapon.

his aim was robbery and pulled a loaded revolver from his pocket. When Bradley saw the weapon he "decided to go along". Defendant showed his gun to employees and on his order Bradley got money from a safe and cash registers, put it in a bank bag and ordered the employees into a walk-in cooler. Defendant held his gun to Bradley's head and guided him out the door. Meanwhile, a departing customer had told police a robbery was in progress; they were waiting for the defendant at the door and ordered him to drop his gun. Defendant threatened to shoot Bradley, but finally yielded and threw down his gun.

Defendant testified the state's testimony was correct so far as he recalled, and gave a history of drug abuse extending to the time of the robbery.

Defendant cites portions of the victim's testimony that he was not scared and felt no harm would come to him. He relies on State v. Tidwell, 500 S.W.2d 329 [6,7] (Mo.App. 1973), to support his contention there was no evidence showing the necessary element of the victim's fear. That case held that although the victim said he was not personally afraid when he gave his money to the defendant at gunpoint, "there could be no merit in the contention that the victim was not motivated by fear". Defendant also cites State v. Keeney, 425 S.W.2d 85 [1,2] (Mo. 1968), which we find support the state, not defendant. The court there held that the victim's fear need not be expressly shown but may be presumed from evidence showing reasonable grounds therefor.

We deny defendant's primary point and consider his double jeopardy contention, arising from dual convictions for robbery and armed criminal action. We originally denied that contention in accord with State v. Valentine, 584 S.W. 2d 92 [6] (Mo. banc 1979), and on January 8, 1980 we handed down our opinion affirming the judgment sentencing defendant to imprisonment for concurrent terms of eight

years for first degree robbery and three years for armed criminal action. Then, on January 15, 1980 our supreme court reversed *Valentine* and held in Sours v. State, No. 61458, where, as here, movant had been convicted of first degree robbery and armed criminal action, and on the ground of double jeopardy the supreme court reversed that part of the *Sours* judgment convicting the movant of armed criminal action. So it is here.

Defendant has now moved for a rehearing. We order that denied but on our own motion we withdraw our original opinion. We now affirm the judgment convicting defendant of first degree robbery and sentencing him to eight years imprisonment therefor, but we reverse that part of the judgment convicting defendant of armed criminal action and sentencing him to a concurrent term of three years imprisonment for armed criminal action.

JAMES D. CLEMENS, Senior Judge

Robert G. Dowd, Presiding Judge, concurs; James R. Reinhard, Judge, concurs; Robert E. Crist, Judge, concurs.

IN THE

# MISSOURI COURT OF APPEALS
# EASTERN DISTRICT

DIVISION ONE

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| STATE OF MISSOURI,<br>*Plaintiff-Respondent,*<br>vs.<br>BOBBY JOE McGEE,<br>*Defendant-Appellant.* | No. 40082 |

Appeal from the Circuit Court City of St. Louis

Hon. Michael F. Godfrey, Judge

OPINION FILED:

April 1, 1980

Appellant Bobby Joe McGee was convicted of assault with intent to do great bodily harm without malice, § 559.190, RSMo 1969, and armed criminal action, § 559.225, RSMo Supp. 1976. He was sentenced to terms of five and three years' imprisonment to be served consecutively.

On appeal he alleges the trial court erred because it: (1) denied his motion for a judgment of acquittal for lack of a submissible case; (2) subjected him to double jeopardy in overruling his motion to dismiss the armed criminal action charge; (3) refused to give to the jury alibi instruction MAI-CR 3.22 requested by him; and (4) allowed into evidence testimony concerning blood stains and a knife found in his automobile, neither having been shown to be connected with the assault.

Reversed as to the armed criminal action conviction because appellant was subjected to double jeopardy; reversed and remanded as to the assault conviction because the trial court's refusal to give the alibi instruction requested by appellant was prejudicial error.

The victim was walking from a bar to her home in south St. Louis when she was assaulted by a man who forced her into her car by threatening her with a knife and cutting her hands. He then drove off with her. When the car slowed for an intersection the victim opened the door, started to get out, but was held in the car by her assailant while the car moved along with her feet dragging on the ground. The driver finally stopped the automobile, the victim fell to the ground and her assailant stood over her threatening her with a knife if she did not get back in the car. He then stabbed the victim in the chest and side as she fought against being dragged back into the car.

Two men in another automobile had seen the victim hanging out of the car, followed it until it stopped, then drove up and stopped about thirty feet behind it. As the two men started to approach the scene on foot, the assailant re-entered his car and drove off, leaving his victim lying on the ground. One of the witnesses obtained the license number.

A license check revealed appellant's father owned the vehicle. Appellant had been driving it at the time of the assault and was arrested for the crime. He was positively identified by the victim as her assailant. Appellant's defense was alibi. He claimed to have been at the River's Edge tavern in Fenton and there was evidence to support his claim. The trial and conviction followed.

Appellant argues the trial court erred in denying his motion for a judgment of acquittal because the state failed to make a submissible case.

In determining whether a submissible criminal case has been made, an appellate court considers as true the evidence and reasonable inferences most favorable to the state and disregards evidence and inferences to the contrary. State v. Franco, 544 S.W.2d 533, 534[1-4] (Mo. banc 1976); State v. Longmeyer, 566 S.W.2d 496, 499[1-8] (Mo.App. 1978).

The positive identification of appellant by the victim, and the recording of the license number of appellant's car by a witness, constituted substantial evidence from which the jury could have found appellant guilty. It is true that conflicting descriptions of appellant and his automobile were testified to by witnesses. But the weight to be given this testimony was for the jury. State v. Brager, 497 S.W. 2d 181, 182[2] (Mo. 1973); State v. Tilley, 569 S.W.2d 346 [2,3] (Mo.App. 1978). There was sufficient evidence when considered in the light most favorable to the state to make a submissible case. State v. Franco, State v. Longmeyer, *supra*.

Appellant next claims he was placed in double jeopardy in violation of his common law and Fifth Amendment rights because he was convicted of both assault with intent to do great bodily harm without malice[1] and armed criminal action.[2] This point is well taken.

The conviction for armed criminal action required that the appellant first be found guilty of the offense of assault with intent to do great bodily harm without malice and, second, be found to have committed the crime with a knife. All of the elements of the underlying felony had to be proved in order to find appellant guilty of the offense of armed criminal action. Therefore, he was subjected to double jeopardy for the same offense. Sours v. State, No. 61458

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[1] § 559.190, RSMo 1969.

[2] § 559.225, RSMo Supp. 1976.

(Mo. banc January 15, 1980). See also State v. Morgan, No. 61504 (Mo. banc January 15, 1980). In *Sours* the supreme court found that armed criminal action and the underlying felony, in that case robbery in the first degree, were the same offense for double jeopardy purposes, specifically overruling, on this point, State v. Treadway, 558 S.W.2d 646 (Mo. banc 1977), cert. denied 439 U.S. 838 (1978), which is relied upon by the state in its brief.

The supreme court in *Sours* followed Harris v. Oklahoma, 433 U.S. 682 (1977) reversing Harris v. State, 555 P.2d 76 (Okl. Cr. 1976). The court interpreted *Harris* as requiring a finding that armed criminal action under the statute and the underlying felony, even though it violated a different statute, constitute only one offense and not two.

In *Sours* the state was required to prove all of the elements of robbery first degree in order to prove the defendant guilty of armed criminal action. Similarly, in the case under review, it was necessary to prove all of the elements of intent to do great bodily harm in order to prove armed criminal action. Therefore, the conviction for armed criminal action must be reversed.

Appellant next contends the trial court erred in refusing to give to the jury alibi Instruction No. "A" requested by him in the form set out as MAI-CR 3.22:

INSTRUCTION NO. "A"

(In pertinent part. The first two paragraphs are the same as those in MAI-CR 3.20 given by the court and quoted below.)

> "2. If the defendant was at the River's Edge Lounge, 4 Gravois Road, Fenton, Missouri, 63026, at the time the alleged offense was committed or if you do not find and believe from the evidence beyond a

reasonable doubt that the defendant was present at the time and place the offense is alleged to have been committed, then you must find the defendant not guilty."

Instead, the court gave MAI-CR 3.20:

"INSTRUCTION NO. 11

One of the issues in this case is whether the defendant was present at the time and place the offenses are alleged to have been committed. On that issue you are instructed as follows:

1. The state has the burden of proving beyond a reasonable doubt that the defendant was present at the time and place the offenses are alleged to have been committed.

2. If the evidence in this case leaves in your mind a reasonable doubt regarding the defendant's presence at the time and place the offenses are alleged to have been committed, then you must find the defendant not guilty."

The trial court erred in refusing to give the alibi instruction requested by appellant, the error was prejudicial, and the cause must be reversed and remanded for a new trial on the assault charge.

MAI-CR 3.20 must be given, if requested in the manner provided in Rule 28.02, formerly 20.02, unless MAI-CR 3.22 is requested by a defendant.[3] By requesting MAI-CR 3.22 a defendant submits to the jury in a positive way that he was at a specific place other than the scene of the crime at the time the crime was committed. Notes on Use 2,

[3]Notes on Use 1, Instruction MAI-CR 3.20.

Instruction MAI-CR 3.22[4] A defendant accepts the risk of the burden of proof of his alibi when he requests this affirmative type submission. This the appellant attempted to do here.

The affirmative submission was supported by the evidence. The victim's testimony was that the attack occurred sometime before 10:20 p.m. and ended at approximately that time. The police report showed the attack occurring at 10:30 p.m. Witness Bohnert's testimony placed appellant at the River's Edge Lounge in Fenton at 10:45 p.m. and the appellant said that he left River's Edge at 10:50 p.m. to drive to the Hee Haw Club in South St. Louis.

The purpose of having the two alibi instructions is to allow a defendant to choose to submit the one designating a specific place, and to take the risk of proving that he was at the designated alibi place when the crime was committed, not at the scene of the crime. Appellant had the right to request MAI-CR 3.22 under the evidence.

The choice of which instruction to give is committed to the defense and not the trial court. It was appellant's prerogative to submit the case to the jury so as to focus

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[4]Notes on Use, Instruction MAI-CR 3.22:

"Notes on Use

1. See *Notes on Use* under MAI-CR 3.20.

2. The difference between this instruction and MAI-CR 3.20 is the first part of paragraph 2. This instruction would be reversible error if given without a specific request for it from the defendant, since the first half of paragraph 2 may be construed as placing the burden of proving the defense on the defendant. State v. Taylor, 118 Mo. 153, 24 S.W. 449 (1893).

But a defendant may wish to ignore the burden of proof implicit in an affirmative type of submission. He may wish to request this instruction so as to submit in a positive way that he was, say, in Kansas City and not in St. Louis where the crime was committed—rather than having the jury be told in a negative manner that it cannot convict unless it finds that he was in St. Louis. Compare, for example, the alternative forms of converses in MAI-CIVIL."

its attention on the testimony placing appellant at the Fenton tavern at the time of the assault. The refusal of the MAI-CR 3.22 instruction prevented the appellant from directing the jury's attention to the evidence he felt bolstered his case the most. Under the pattern instructions he is permitted to take the risk of the burden of proof. The refusal was therefore error.

To find the error harmless would render the Notes on Use of the two instructions meaningless by permitting the trial court, rather than the appellant, to decide which instruction to give, even though there is evidence to support the giving of MAI-CR 3.22. No cases have been cited by either party and none have been found which rule on this specific point. It is difficult to conceive of a case, however, in which MAI-CR 3.20, the general alibi instruction, would not adequately instruct the jury even when there is substantial evidence of the defendant's presence at a specific place other than the scene of the crime. Therefore, to give meaning to the two alibi instructions and the Notes on Use as promulgated by the supreme court it is necessary to find that the trial court's refusal to give Instruction MAI-CR 3.22 was prejudicially erroneous.

The state argues that the appellant could have been en route from Fenton to the Hee Haw Club at the time of the attack instead of at River's Edge. If so, the state concludes, the instruction placing appellant definitely at River's Edge at the time of the crime was erroneously given. The evidence as to times was conflicting but the earliest time of arrival at the Hee Haw Club in the testimony was 10:50 p.m. According to the victim the assault began at approximately 10:10 p.m. and ended at approximately 10:20 p.m., although the police report, hearsay evidence, place the time at 10:30 p.m. Appellant testified the time required to drive from River's Edge to the Hee Haw Club was twenty to twenty-five minutes. To arrive at the Hee

Haw Club at 10:50 p.m., therefore, he could have left River's Edge no earlier than 10:25 p.m., after the assault had already occurred or was in progress. There was no substantial evidence that appellant was en route from River's Edge at the time of the crime.

The state relies on State v. Reynolds, 517 S.W.2d 182 (Mo.App. 1974) to support its contention that the refusal to give appellant's Instruction No. "A" was not prejudicial error. *Reynolds* was submitted prior to the effective date of the MAI-CR instructions, and although the logic of *Reynolds* might be found applicable here, the Supreme Court Rules and Notes on Use of the MAI-CR Instructions must be followed.

Finally, appellant claims that the trial court erred in admitting into evidence testimony concerning bloodstains found in his car and a knife which was found in the trunk of the automobile. This point has not been preserved for appellate review because no proper objection was made when the evidence was introduced and will not be addressed on this appeal. The problem may not arise in the same manner upon retrial.

The judgment of conviction of armed criminal action is reversed; the judgment of conviction of assault with intent to do great bodily harm without malice is reversed and remanded for a new trial.

ROBERT O. SNYDER, Judge

John J. Kelly, Jr., Presiding Judge, concurs; Joseph G. Stewart, Judge, concurs.

**IN THE**

# MISSOURI COURT OF APPEALS
# EASTERN DISTRICT

DIVISION THREE

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| STATE OF MISSOURI,<br>*Plaintiff-Respondent,*<br>vs.<br>MARLON PAYNE,<br>*Defendant-Appellant.* | **No. 40983** |

Appeal from the Circuit Court of the City of St. Louis

Hon. Richard J. Brown, Judge

OPINION FILED:

May 13, 1980

Marlon Payne, defendant herein, appeals from his conviction of robbery first degree and armed criminal action. A jury assessed his punishment at five years and three years imprisonment, terms to run concurrently.

The evidence indicates that D. L. Adams picked up the defendant and two other males in his taxi. Adams drove the three men to a location in the City of St. Louis where they instructed him to stop the cab. One of the three men got out of the cab leaving some money with the two remaining passengers. Adams informed the two passengers that they owed him $3.95. Each of them gave him $1.32 and a discussion ensued concerning the amount owed. Subsequently one of the remaining passengers later identified as Marlon Payne, the defendant, got out of the cab, pulled out

a gun and demanded that Adams give him "that money". Adams gave the gunman $2.64 and was attempting to drive away when the defendant instructed him not to move or he would "blow (Adam's) head off." At that moment a police car rounded the corner and arrested the defendant who was running from the scene. The arresting officer confiscated the defendant's clothing and $3.39 from his person.

Defendant complains in his sole point on appeal that the trial court erred in allowing the $3.39 to be admitted into evidence. It is defendant's position that because the taxidriver did not identify the money as that which was taken from him it was error to admit the money into evidence. Defendant claims that this error prejudiced him in the eyes of the jury because it necessarily inferred that the money seized from him was that taken in the robbery.

We agree with defendant that mere possession of a quantity of money is not relevant to the issue of whether defendant stole the money. *State* v. *Ball,* 339 S.W.2d 783, 786 (Mo. banc 1960). In a case such as the one we are presented with here, however, where there is a short period of time between the commission of the crime and arrest, and the amount of money taken from the victim is similar to the amount of money found in the defendant's possession at the time of arrest, evidence of the amount seized is relevant, and, therefore, admissible. *State* v. *Harris,* 539 S.W.2d 793, 794 (Mo.App. 1976); *State* v. *Britt,* 504 S.W.2d 38, 42 (Mo. 1974). We find no error in the admission of the money into evidence. In any event, the alleged error could have only been harmless in light of the overwhelming weight of the evidence. *State* v. *Epperson,* 571 S.W.2d 260, 268 (Mo. banc 1978). Defendant's claim of error is without merit.

The defendant in this case was convicted of robbery first degree and armed criminal action. In *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980) the Missouri Supreme

Court held that convictions for both robbery first degree and armed criminal action arising out of the same occurrence violated prohibitions against double jeopardy. *Id.* at 210. We are bound by the *Sours* case and therefore reverse the conviction for armed criminal action. The conviction of robbery first degree stands affirmed.

ROBERT G. DOWD, Presiding Judge

Robert E. Crist, Judge, concurs; James R. Reinhard, Judge, concurs.

**IN THE**

# MISSOURI COURT OF APPEALS
# EASTERN DISTRICT

DIVISION THREE

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| STATE OF MISSOURI,<br>*Respondent,*<br>v.<br>MICHAEL L. WHITE,<br>*Appellant.* | **No. 41276** |

Appeal from the Circuit Court City of St. Louis

Hon. Thomas W. Challis

OPINION FILED:

April 8, 1980

Defendant was convicted by a jury of the offenses of robbery first degree and armed criminal action. The jury assessed his punishment at five years for the robbery charge and three years for the armed criminal action charge. The court entered judgment in accordance with the jury's verdict and assessment of punishment and ordered said sentences to run consecutively.

The victim was a cab driver. Defendant entered the victim's car at the Chase Park Plaza Hotel and shortly thereafter pulled a revolver on the victim and indicated that "it was a stickup." The victim gave defendant a ten dollar bill, a five dollar bill, and some change. Defendant ordered the victim to drive to victim's home to get more money. While on the way, the victim saw some police cars

waiting at a light at West Florissant and Calvary. The victim started blowing his horn, jumped out of the cab, and told the officers that the man in his car had held him up.

Officer Johnson testified that he placed defendant under arrest and recovered $20.15 in defendant's pocket, consisting of a ten dollar bill, a five dollar bill, and $5.15 in change. He further testified that he saw defendant get out of the car and throw a weapon under the automobile which was seized by Officer Jackson.

Officer Jackson testified that he seized a PPL 380 automatic weapon from under the cab. This weapon was recovered in evidence as Exhibit No. 1.

Defendant's first two points refer to questions relating to defendant's possession of a gun at a time other than at the time of the offense charged. He first contends that the trial court erred in failing to grant a mistrial when prosecuting attorney "asked Defendant whether he had a gun at another location four days prior to the robbery for which he was on trial as said question goes beyond the scope of proper cross examination, was improper impeachment and was improper and highly prejudicial evidence of prior criminal behavior for which no conviction resulted. . . ."

On direct examination defendant denied that he had a gun with him on the date of the alleged offense. On cross-examination, defendant stated that he did not own a gun and that State's Exhibit No. 1 was not his gun. Further, he testified that he had never owned a gun that was similar to State's Exhibit No. 1. The prosecuting attorney then asked: "Isn't it a fact that you had a gun similar to that gun [State's Exhibit No. 1] four days before that [May 5, 1978, the day of the robbery]? Before defendant could answer, defense attorney objected to the question and moved for a mistrial. The court sustained the objection, instructed the jury to disregard it, and denied the mistrial. The questioning then continued:

Q. Mr. White, is it your testimony you did not have this gun in your possession on May the 5th, 1978?

A. Yes.

Q. You did not?

A. No.

Q. Did you have a gun similar to this in your possession on May the 5th, 1978?

A. No.

Q. Did you have a gun, any gun similar to this in your possession prior to May the 5th, 1978?

A. No.

Q. Did you have a gun similar to that in your possession on May the 1st, 1978?

A. No.

Q. Did you have a gun similar to that in your—?

At this time, defendant again objected. A discussion was conducted outside the hearing of the jury and thereafter the court overruled defendant's objection. The following questioning ensued:

Q. (By Mr. Hoag) It is your testimony on May the 1st, 1978, you did not have a gun in your possession similar to that? [State's Exhibit No. 1]

A. Yes.

Q. Is it your further testimony you did not have a gun similar to that at 4903 Goodfellow, at approximately 10:30 p.m.?

A. Yes. . . .

Q. You did not have a gun in your possession at that time, 10:30 p.m., at 4903 Goodfellow?

A. I did not.

Q. 4903 Goodfellow, which is a Shell Service Station, you did no thave a gun similar to that in your possession?

A. I did not.

Defendant's sole ground for objection was that the questions were evidence of other criminal activity. Defendant's other complaints which he has raised here on appeal were not stated at the time of the objection. On appeal, a defendant may not broaden the scope of his trial objections. State v. Williams, 575 S.W.2d 838, 840 (Mo.App. 1978). We therefore examine only defendant's contention that the questions asked as to his possession of a similar weapon at another time constituted evidence of other criminal activity. We recognize that proof of commission of a separate and distinct crime is not admissible unless such proof has a legitimate tendency to directly establish defendant's guilt or comes within one of several exceptions. State v. Holbert, 416 S.W.2d 129, 132 (Mo. 1967); State v. Reese, 364 Mo. 1221, 274 S.W.2d 304, 307 (banc 1954). It is not a crime to possess a gun and we cannot say that a question asking if the defendant was in possession of a gun four days prior to the offense for which he was charged constitutes evidence of another crime. This point is without merit.

Defendant next contends that the court erred in permitting the state to produce the rebuttal testimony of Lamont Williams because it was improper impeachment evidence and was evidence of another crime. Williams testified that he saw defendant with a gun at the Shell Service Station where he worked at 10:30 p.m. Defendant's attorney did not object to any specific questions asked of Williams. His only objection was that the testimony constituted evidence of another crime. Because we addressed this issue

under the previous point, we need not discuss it here. We believe that the evidence was proper rebuttal. A police officer saw defendant throw a weapon under the car. State's Exhibit No. 1 was found under the car. Defendant denied the possession of a gun on the night of the crime May 5th. He denied any knowledge of State's Exhibit No. 1. Further, he denied having a similar weapon in his possession May 1. Witness Williams testified that he saw defendant on the night of May 1 at the Shell Service Station with a gun in his possession. He identified State's Exhibit No. 1 as the gun which defendant possessed. This was proper rebuttal. The jury could not reasonably have inferred from the state's rebuttal evidence that appellant had been involved in prior criminal activity. *See* State v. Whitt, 592 S.W.2d 316, 317 (Mo.App. 1979). Because this was proper rebuttal,[1] we find no error here.

Defendant finally contends that the court erred in failing to grant a mistrial because the prosecuting attorney told the jury in the opening statement that defendant planned to take the victim to the victim's house and have sexual intercourse with his wife. Defendant claims that evidence relating to this statement was excluded at the trial and the state knew or should have known that it would be so excluded. The only portion of the opening statement in the record is the following:

> Mr. Hoag: The state's evidence will further show a conversation ensued, the defendant wasn't happy with the amount of money he had, and he asked Mr. Kranz if he had some money at home. The conversation ensued when Mr. Kranz said he did, and in addition a color T.V. was mentioned, and the defendant ordered him

[1]We note that at the time of his objection to the cross-examination of defendant, defense counsel said: "If Mr. Hoag has rebuttal evidence, he could bring in rebuttal as to gun ownership or someone who saw him with a gun."

> to drive to his house, which was in Spanish Lake, and he indicated at that time he was going to perform an act of sexual intercourse with his wife.

No objection was made at the time of the opening statement, but at the end of the defendant's case defendant asked for a mistrial because of the failure of the state to connect up that portion of the state's opening statement relating to the proposed sexual intercourse with the victim's wife.

Initially, we note that defendant was charged with the offense of sodomy on the victim as well as those charges of which he was convicted. The jury acquitted him of the charge of sodomy. The state asked the victim: "Was there any conversation with respect to your wife; about your wife?" The defendant's attorney objected claiming the question was leading and the court sustained the objection. The state therefore did not produce any testimony as to the comment of the proposed sexual intercourse with victim's wife.

When the prosecuting attorney has reasonable grounds to believe that the facts stated in his opening statement can be proved, such statement is not improper, although the facts are not followed with proof because the evidence is either excluded or omitted. State v. Underwood, 530 S.W.2d 261, 263 (Mo.App. 1975). The trial court is vested with wide discretion in determining whether prosecuting attorney acted in good faith in making the statement. *Id.* Defendant admits that he was furnished the police report which included a statement by victim that defendant made the complained of statement to him. We find no evidence of bad faith. If the victim had testified as to what the defendant had said, such evidence would have been admissible as part of the "res gestae." Regardless, defendant's failure to object at the first opportunity constituted a waiver. This point also is without merit.

Subsequent to the filing of the briefs in this case the Supreme Court determined that convictions of robbery first degree with a dangerous and deadly weapon and armed criminal action violated the prohibition against double jeopardy. Sours v. State, 593 S.W.2d 208 (Mo. banc 1980). Therefore, we are compelled to reverse defendant's conviction of the offense of armed criminal action.

The conviction and judgment is reversed outright with respect to Count III, armed criminal action. The conviction and judgment in Count I, robbery first degree, is affirmed.

JAMES R. REINHARD, Judge

Robert G. Dowd, Presiding Judge, concurs; Robert E. Crist, Judge, concurs.

**IN THE**

# MISSOURI COURT OF APPEALS
# EASTERN DISTRICT

DIVISION THREE

| | |
|---|---|
| STATE OF MISSOURI,<br>*Respondent,*<br>v.<br>JOHNNY WILLIAMS,<br>*Appellant.* | **No. 41095** |

Appeal from the Circuit Court of the City of St. Louis

Hon. Lackland Bloom, Judge

OPINION FILED:

March 4, 1980

Double jeopardy case.

On October 18, 1978, defendant was convicted by a jury of the following: (1) assault with intent to rape with malice aforethought under § 559.180, RSMo 1969 (Count I); (2) armed criminal action under § 559.225, RSMo Supp. 1976 (Count II); and (3) carrying a concealed weapon under § 564.610, RSMo 1969 (Count III). He was sentenced to 20 years on Count I, 3 years on Count II, and 5 years on Count III. The sentences are to run concurrently. We reverse his conviction and sentence under Count II by reason of double jeopardy. We affirm his convictions and sentences under Counts I and III.

The victim, age 15 at the time of the occurrence, January 31, 1978, had to walk 3 or 4 blocks from her bus stop

to her home. While en route, defendant grabbed her and pulled her into an alley. Screaming and struggling, she was told by defendant he would kill her if she did not stop. Defendant put a gun to her head and "clicked" it twice. The victim continued to scream and struggle. Defendant put the gun away and hit her in the jaw. Defendant tried to open her coat. He held her on the ground and asked her if she was going to have sex with him.

When Officers Morris and Hampton arrived on the scene, defendant has his arm around the victim and had her up against a wall. She broke away from defendant and ran to Officer Morris. She was hysterical and seemed to be in pain. She could not talk to him because her jaw was locked. She had scratches on her neck. When other police officers arrived, she was able to tell them defendant struck her, tried to rape her, and had a gun. She was taken to city hospital for treatment of her jaw and the scratches on her neck.

Defendant correctly argues that he has been put in double jeopardy. Although the sentences are to run concurrently, the conviction and sentence under the armed criminal action charge causes defendant to be ineligible for parole, probation, or conditional release for three years.

Section 559.180, RSMo 1969, provides in pertinent part:

> Every person who shall, on purpose and of malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to . . . ravish . . . such person . . . , shall be punished by imprisonment in the penitentiary not less than two years.

Section 559.225(1) RSMo Supp. 1976, provides in pertinent part:

> [A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance,

> or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years.

The armed criminal action and the underlying felony of assault with intent to rape with malice aforethought are the same offense for double jeopardy purposes. Convictions and sentences for both constitutes prohibited multiple punishments. There was in law and fact only one crime. The elements of armed criminal action include all of the elements of assault with intent to rape. Sours v. State, No. 61458 (Mo. banc Jan. 15, 1980). The conviction and sentence for the armed criminal action, therefore, must be reversed.

Defendant questions whether the evidence was sufficient to support the conviction of assault with intent to rape. He predicates this argument on the proposition that there was such a conflict in testimony that corroborating evidence of the crime was necessary. He relies on State v. Platt, 496 S.W.2d 878 (Mo.App. 1973). We disagree. While there were some conflicts in the testimony, the victim told a positive and unshaken story of sexual outrage. Her story was entirely possible and not contrary to human experience. Accordingly, the truth of her story was for the jury to decide. State v. Neal, 484 S.W.2d 270, 272 (Mo. 1972).

We reverse defendant's conviction and sentence for armed criminal action. We affirm his convictions and sentences for assault with intent to rape with malice aforethought and for carrying a concealed weapon.

ROBERT E. CRIST, Judge

Robert G. Dowd, Presiding Judge, concurs; James R. Reinhard, Judge, concurs.

## APPENDIX B

Section 559.180, RSMo 1969, read as follows:

559.180. Assault with intent to kill.—Every person who shall, on purpose and of malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, maim, ravish or rob such person, or in the attempt to commit any burglary or other felony, or in resisting the execution of legal process, shall be punished by imprisonment in the penitentiary not less than two years.

Section 559.190, RSMo 1969, read as follows:

559.190. Felonious assault without malice aforethought. —Every person who shall be convicted of an assault with intent to kill, or to do great bodily harm, or to commit any robbery, rape, burglary, manslaughter or other felony, the punishment for which assault is not hereinbefore prescribed, shall be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by a fine not less than one hundred dollars and imprisonment in the county jail not less than three months, or by a fine of not less than one hundred dollars.

Section 560.120, RSMo 1969, reads as follows:

560.120. Robbery in first degree.—Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of

some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Section 560.135, RSMo 1975 Supp., reads as follows:

560.135. Armed robbery, punishment for.—Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment by the division of corrections not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment by the division of corrections not exceeding five years.

Section 559.225, RSMo 1976 Supp., reads as follows:

559.225. Armed criminal action—penalty—exceptions. —1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five

years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in additon to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

## APPENDIX C

Section 750.529, M.C.L.A., reads as follows:

750.529. Armed robbery; aggravated assault—Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. As amended P.A. 1959, No. 71, § 1, Eff. March 19, 1960.

Michigan Compiled Laws Annotated, 750.227b, reads as follows:

Michigan Compiled Laws Annotated, 750.227b. *Possession at time of commission or attempted commission of felony; additional sentence, punishment—*

"Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony except the violation of section 227 or section 227a[1], is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

"(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the

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felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

"(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term, imposed pursuant to subsection (1). P.A. 1931, No. 328, § 227b, added to P.A. 1976. No. 6, § 1, Eff. Jan. 1, 1977." [Footnote omitted.]